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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit
New FM Station on Channel 265A
in Calistoga, California

RECEIVED

TO: The Honorable Edward Luton
Administrative Law Judge

MAR 4 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**REPLY TO OPPOSITION TO
PETITION TO REOPEN THE RECORD**

Gary E. Willson (Willson) files this reply to the Opposition to Petition to Reopen the Record filed by Moonbeam, Inc. (Moonbeam). As detailed more particularly below, Moonbeam admits the primary factual allegations made by Willson. It asserts nevertheless that the requested issues should be denied.

Moonbeam, in its Opposition, admits the key elements of Willson's Petition: (1) Fred Constant is indeed the general manager of KRSH; and (2) this interest should have been reported. Moonbeam asserts yet once again its oft-repeated refrain that the failure to report was inadvertent and unintentional.

A brief summary of the undisputed facts is helpful:

(1) Moonbeam failed to report, until after an issue was requested, Fred Constant's ownership interests in a construction permit for a station in Ketchum, Idaho. The need to report spousal media interests was clearly highlighted at that time;

(2) Fred Constant is the general manager of KRSH and has been since the end of November 1993;

(3) Ms. Constant was aware her husband was serving as general manager of KRSH;

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(4) Moonbeam failed to report Fred Constant's managerial interests in KRSH until nearly a month after Willson filed his Petition; and

(5) Moonbeam has, since Willson filed his Petition, reported two more media interests acquired by Fred Constant--both reported late.

Despite the above undisputed facts, Moonbeam asserts no issue is warranted since there was no motive for Moonbeam to hide Mr. Constant's managerial interests in KRSH. Moonbeam also claims that there is no pattern of failing to timely report Mr. Constant's media interests. Willson respectfully submits that Moonbeam is wrong on both counts.

A. Lack of Candor/Misrepresentation.

Moonbeam claims there is no demonstrated motive or intent to conceal Mr. Constant's employment other than Willson's "unsupported assertion that the employment may have some negative effect on Moonbeam's comparative position in this proceeding." Opp. ¶5. There is no question that a spouse's managerial position, especially with a station in the same market, warrants a diversification demerit. There is no question that a managerial position with another radio station in the same market is an attributable interest. See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 394, n. 5, 5 RR2d 1901, 1908, n. 5 (1965). Cuban American Limited, 2 FCC Rcd. 3264, 3268 (Rev. Bd. 1987) (slight diversification demerit warranted for managerial position with two area television stations); Pueblo Radio Broadcasting Service, 5 FCC Rcd. 4829, 4832 (Rev. Bd. 1990) (slight diversification demerit for role as general manager

in a television station in another state); see also, Thomas C. and Elsie Collins, 53 RR2d 219, 221 (Rev. Bd. 1983); Northland Communications, 58 RR2d 825, 828 (Rev. Bd. 1985); Lion's Share Broadcasting, (FCC 93R-64) __ FCC Rcd. __ (Rev. Bd. released December 6, 1993) (moderate demerit assessed for managerial position with two stations in the same state).

Moonbeam claims that Willson has not established that Fred Constant's employment as general manager will be attributed to Mary Constant. This is not so. The Commission's doctrine on spousal attribution for purposes of diversification in comparative broadcast proceedings firmly provides that the media interests of one spouse will be attributed to the other. Richard P. Bott, 4 FCC Rcd. 4924, 4926 (Rev. Bd. 1989) ("Under the essential doctrine of spousal attribution, the law requires that the media interests of her husband be treated as if they were her own") at ¶19. Since managerial positions as noted above are clearly media interests, Fred Constant's employment as general manager is attributable to Moonbeam.

Moonbeam claims that the spousal attribution presumption is rebuttable. This is true, but as noted in Bott, the spousal attribution presumption is of "nearly conclusive stature." The Board also noted that it was aware of no cases where the presumption had been rebutted. Furthermore, the burden is on Moonbeam to rebut the presumption, and there is no evidence supporting its position. On the contrary, it appears that Mary Constant and Fred Constant are working together at KRSB. Mary Constant is

apparently the "full-time staff member in charge of running the KRSB main studio on Diamond Mountain Road." See Ex. 1.

Moonbeam claims that Willson cites no cases where managerial employment by a spouse has been considered by the FCC. The FCC has considered such interests. See Marvin J. Diamond, Esq., 4 FCC Rcd. 8526 (1989); Richard R. Zaragoza, Esq., 2 FCC Rcd. 5078 (1987). In both of these cases, the Commission evaluated whether the managerial positions of one spouse should be attributed to the other spouse to determine compliance with the Commission's multiple ownership rules. In both instances, the Commission found that the high burden of review had been met and that the presumption of spousal attribution had been rebutted.

It is quite evident Moonbeam has a strong motive for failing to disclose Fred Constant's managerial duties at KRSB. Mary Constant's 100 percent ownership of the Calistoga station, as well as Mr. Constant's role as general manager, are far more compelling interests than those in the Diamond or Zaragoza cases. Furthermore, unlike the Diamond and Zaragoza cases, there is no basis which would warrant rebuttal of the presumption of spousal attribution.

Moonbeam also attempts to undermine the obvious motive for its failure to report by claiming that Mary Constant did not intend to conceal her husband's employment, that she was unaware that this would have any negative impact on her application, and that she did not realize that management positions required reporting. Her assertion is supported only by her self-serving declaration. Her claim is also difficult to believe. First, the

application clearly requires that an applicant report "any interest in or connection with any other broadcast station, pending broadcast application, or newspaper in the same area." See FCC Form 301, §II, Question 12(b). Secondly, Mary Constant was clearly on notice of the need to report spousal interests. Moonbeam's failure to timely report Fred Constant's Ketchum, Idaho broadcast interest was the subject of a petition to enlarge issues filed by Willson. There was a great deal of discussion concerning the need to report spousal broadcast interests. Moonbeam acknowledged the need to amend when it finally did report Mr. Constant's interest in the Ketchum station in its July 21, 1993 Petition for Leave to Amend.

Moonbeam's claim it lacked intent can likewise not be swept away in any event by the self-serving suspect declaration of Mary Constant. See Standard Broadcasting, Inc., 71 RR2d 1220, 1226 (Rev. Bd. 1992) ("Intent is a factual question that, like other factual questions, can be found from evidence that affords a reasonable inference. It can be found, for example, from a showing of motive or 'a logical reason or desire to deceive'"). Pinelands, Inc., 71 RR2d 175, 183 (1992) ("Because intent is a state of mind, ordinarily not capable of indisputable proof, it must be inferred from the circumstances").¹

¹ Moonbeam also attempts to escape a diversification demerit by claiming that Fred Constant has "agreed to give up his employment if it will result in a diversification demerit against Moonbeam." Opp. at ¶6. This divestment commitment is late. Moonbeam, therefore, cannot avoid the consequences of Fred's role as general manager. See Santee Cooper Broadcasting Company, 99 FCC2d 781, 794-795 (Rev. Bd. 1984); Jerome Thomas Lamprecht, 99 FCC2d 1219, 1222 (Rev. Bd. 1984); Big Bay Broadcasting, 3 FCC

Moonbeam's claim that the failure to report the media interest of Fred Constant does not demonstrate an attempt to deceive is totally unavailing. Moonbeam first cites Pinelands, Inc., 7 FCC Rcd. 6058, 6066 (1992) for the proposition that the failure to report media interests of an investor in excess of FCC limitations does not result in a misrepresentation issue. First, there was no failure to report media interests in excess of FCC limitations. See Pinelands, supra, at n. 28. Pinelands is also an assignment case. There was no motive not to report since there was no concern about diversification demerits or noncompliance with the multiple ownership rules. Secondly, the allegations were contested and not supported by affidavit. Here, not only are Willson's allegations supported by affidavit, but the essential underlying facts are admitted by Moonbeam. In Pinelands, all the information which was purportedly being concealed was information on file with the Commission. Fred Constant's position as general manager of KRSB is not.²

Rcd. 6481, 6487 (ALJ 1988, aff'd Rev. Bd., 4 FCC Rcd. 4676 (Rev. Bd. 1989), aff'd Comm., 5 FCC Rcd. 1294 (1990); Colonial Communications, Inc., 67 RR2d 999 at n. 5 (Rev. Bd. 1990). The divestiture commitment is also conditional.

² Other cases cited by Moonbeam are equally unavailing. In Naguabo Broadcasting Company, 7 FCC Rcd. 1696 (1992), there was no motive for failure to report the media interests of an applicant's father, a non-attributable interest. Again, here, the situation is very different. Moonbeam has failed to report an attributable spousal interest. In Valley Broadcasting Company (KVBC-TV), 4 FCC Rcd. 2611 (Rev. Bd. 1989), reporting issues were added. Finally, in Stephen B. Bellinger, 49 FCC2d 1377 (Rev. Bd. 1974), the Board found no motive for failure to report since the unreported material would have no adverse impact on the comparative evaluation of the applicant.

In sum, Moonbeam had a clear intent and motive to hide Mr. Constant's managerial position with another FM station in the same market as the Calistoga station. Motive and intent are derived from the objective facts. Those facts unequivocally demonstrate that Mr. Constant was, and is, the general manager of KRSH. The facts also are that media interests of one spouse are attributable to the other spouse, that managerial positions are clearly media interests, and that even award of a slight diversification demerit in this proceeding may well be decisional.

B. Ineptness and Rule 1.65 Reporting Issue.

Reporting issues are warranted where there is an intent to conceal pertinent information from the Commission or where the violations are so numerous as to undermine the applicant's responsibility to be a licensee. See Merrimack Valley Broadcasting, Inc., 57 RR2d 713 (1984); Valley Broadcasting Company, 4 FCC Rcd. 2611, 2618 (Rev. Bd. 1989). The only showing required is an intent or a pattern, not both. Here, however, there is both an intent and a pattern of failing to report material evidence. The intent issue has already been addressed.

Moonbeam denies there is any pattern of failing to disclose Fred Constant's media interests. Ironically, however, when Moonbeam did finally decide to report Fred Constant's managerial role at KRSH, it disclosed two other Fred Constant media interests which it had failed to timely reveal: (1) Idaho Broadcasting Consortium, Inc.'s (IBC's) application for a new FM station in Gooding, Idaho. (Mr. Constant is the 100 percent shareholder of the corporate applicant); and (2) IBC's proposal

to purchase the construction permit for KMAT-FM, Sutter Creek, California. The application for the new FM station in Gooding, Idaho was filed five months ago, on September 20, 1993; and the application for consent to the assignment of the construction permit for the Sutter Creek station was filed over two months ago, on December 9, 1993.

These most recent failures are, of course, in addition to Moonbeam's earlier failure to timely report Mr. Constant's media interest in a Ketchum, Idaho FM station. Moonbeam inconsistently argues that Moonbeam never had an obligation to report the Ketchum, Idaho acquisition. However, it filed a Petition for Leave to Amend its application to report the interest after Willson filed his petition to enlarge. In its Petition for Leave to Amend, filed on July 21, 1993, Moonbeam claimed the amendment was necessary in order to comply with Rule 1.65 and attributed its failure to timely report the interest as "due to an unintentional administrative oversight."

Moonbeam also claims that its earlier failure to report should be ignored since Willson's Third Petition to Enlarge, which sought enlargement of issues in part based on Moonbeam's failure to report, was denied. Moonbeam accuses Willson of wanting "another bite of the apple." The issue here is not only Moonbeam's failure to report a media interest, but also Moonbeam's demonstrated pattern of failing to report media interests. The only way to establish a pattern is to reference the specific numerous incidents where Moonbeam has failed to report media interests. Willson has properly done this.

C. Moonbeam's Procedural Arguments.

Moonbeam, in essence, claims the issue should not be added since the Commission's diversification policy is as suspect as the Commission's integration policy, which was recently rejected by the Court of Appeals in Bechtel II. See Bechtel v. FCC, 1993 WL 521071 (D.C. Cir. 1993). The fact is, however, that the Court of Appeals did not reject the Commission's diversification policy and the Commission is still implementing its diversification policies in comparative broadcast hearings. Intermart Broadcasting Gulf Coast, Inc., 8 FCC Rcd. 8382 (1993). Whether the Commission or the Court at some future date reconsiders the current diversification policy is irrelevant. The fact is, the policy is now in effect. It is just as likely, if not more likely, to stay in effect as not. Furthermore, the issues here involve lack of candor, failure to report, and ineptness.

Moonbeam also makes its usual untimeliness argument. However, it is undisputed that Willson timely filed his Petition to Reopen the Record within 15 days of receipt of the declarations of Messrs. Zlot, Kefford and Bjugstad, which serve as the backbone of his Petition.³

³ Moonbeam challenges the scope of Willson's discovery request. It claims there are no disputes or relevant questions concerning Mr. Constant's duties or obligations. On the contrary, it is clearly relevant to determine, for instance, when Mr. Constant began his duties as general manager of the station.

WHEREFORE, it is respectfully requested that Willson's Petition to Reopen the Record and Enlarge Issues be granted and that the following issues be added:

1. To determine whether Moonbeam and/or Mary Constant its sole shareholder has lacked candor or made misrepresentations by failing to disclose the broadcast interest of her husband, Fred Constant in KRSH and, if so, the affect thereof upon Moonbeam's and/or Mary Constant's basic qualification to be a Commission permittee/licensee.
2. To determine whether Moonbeam and/or Mary Constant has violated Rule 1.65 by failure to timely report Mr. Constant's broadcast interest in a station in Ketchum, Idaho, and by again later failing to report his interest in KRSH, for failure to timely report his interest in a new application for Gooding, Idaho, and for failure to timely report his interest in an assignment application to acquire KMAT in Sutter Creek, California and, if so, the effect thereof upon Moonbeam's and/or Mary Constant's basic qualification to be a Commission permittee/licensee.
3. To determine whether Moonbeam and/or Mary Constant has demonstrated ineptness or carelessness in the prosecution of its application and, if so, the affect thereof upon Moonbeam's and/or Mary Constant's basic qualification be a Commission permittee/licensee.

Respectfully submitted,

GARY E. WILLSON

By 
A. Wray Fitch III
His Attorney

GAMMON & GRANGE
8280 Greensboro Drive
Seventh Floor
McLean, VA 22102-3807
(703) 761-5000

March 4, 1994

EXHIBIT 1

Relevant Portions of Frederic W. Constant Declaration

attached to

Opposition to Petition for Revocation of
Modified Construction Permit, Denial of
Application for License and Rescission
of Program Test Authority

In re Matter of Wine Country Radio

File Nos. BMPH-930406IA and BLH-931214KH

I am familiar with Gordon Zlot, James Kefford, Kent Bjugstad and Ronald Castro, each of whom state in declarations that they visited the KRSB studio and found the studio vacant and unequipped. Although they do not professionally identify themselves in their declarations, they are all affiliated with radio stations in the area that compete with KRSB. I believe the Commission should consider the motivations of these individuals in their sworn statements which are written in such a similar fashion that it appears the statements were all prepared by one person and are not the words of the individuals signing the statements.

First, my wife, Mary Constant, is the full-time staff member in charge of running the KRSB main studio on Diamond Mountain Road. Her tasks include answering the phone, greeting visitors, and general administrative duties. She is not always in the main studio building for the full 13 hours a day listed on the sign. However she is at the studio an average of eight hours each day from Monday through Sunday, more than 40 hours each week. She keeps a log of her hours at the studio. When she leaves the main studio building, she places a note on the front door explaining when she will return. Mr. Kefford and Mr. Zlot are incorrect when they state that during their December 13, 1993, visit, the sign on the door stated that the office hours were from 8:00 a.m. to 6:30 p.m., and that the return clock indicated a return time of 6:30 p.m. As can be seen from

DECLARATION

I, Frederic W. Constant, General Manager of KRSH(FM), have read the foregoing statements and declare these matters to be true, correct and to the best of my knowledge and belief.



Frederic W. Constant

February 3, 1994

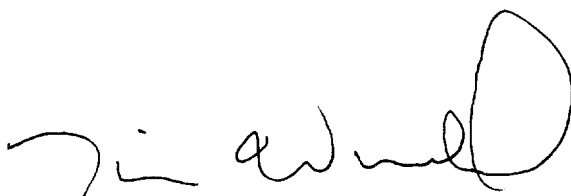
CERTIFICATE OF SERVICE

I, Tim Wineland, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent, this 4th day of March 1994, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing REPLY TO OPPOSITION TO PETITION TO REOPEN THE RECORD to the following:

* The Honorable Edward Luton
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 225
Washington, D.C. 20554

Hearing Branch, Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7212
Washington, DC 20554

Lee W. Shubert, Esq.
Susan H. Rosenau, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, VA 22203-1633
(Counsel for Moonbeam, Inc.)

A handwritten signature in cursive script, appearing to read 'Tim Wineland', written over a horizontal line.

Tim Wineland

* By Hand